No. 17-1625

IN THE

Supreme Court of the United States

RIMINI STREET, INC., ET AL.,

Petitioners,

v.

ORACLE USA, INC., ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION AND RECORDING INDUSTRY ASSOCIATION OF AMERICA, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. The Cost of Enforcing Music Copyrights Through Litigation Can Be Prohibitive. 6

A. Litigation Costs Are a Barrier to Enforcement of Music Copyrights. 6

B. Widespread Online Infringement Has Significantly Exacerbated the Adverse Impact of the High Costs of Copyright Litigation 10

II. The Ability to Recover Full Costs Is Necessary to Mitigate the Expense of Protecting Music Copyrights. 13

A. Awarding Full Costs Provides the Proper Incentive Needed for Plaintiffs to Tackle Large-Scale Infringement 14

B. Defendants and Claimants in Smaller Copyright Cases Also Rely on the Ability to Recover Full Costs. 16

1. Defendants Need Full Cost Recovery as a Deterrent to Meritless Litigation 16

2. Absent the Ability to Recover Full Costs, Music Litigants May Lose More Than They Win. 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Berry v. Deutsche Bank Trust Co. Americas,
632 F. Supp. 2d 300 (S.D.N.Y. 2009) 15

BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.,
149 F. Supp. 3d 634 (E.D. Va. 2015) 12, 13

BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.,
234 F. Supp. 3d 760 (E.D. Va. 2017) 12, 13

Capitol Records, Inc. v. MP3tunes, LLC,
No. 07-cv-9931, 2015 WL 13684546
(S.D.N.Y. Apr. 3, 2015) 5, 14

Capitol Records, Inc. v. MP3tunes, LLC,
No. 07-cv-9931, 2015 WL 7271565
(S.D.N.Y. Nov. 12, 2015) 6, 14, 15

Capitol Records, Inc. v. MP3tunes, LLC,
No. 07-cv-9931 (S.D.N.Y. Jan. 26, 2018) 15

In re Charter Commc'ns, Inc., Subpoena Enf't Matter,
393 F.3d 771 (8th Cir. 2005) 10

Crawford Fitting Co. v. J. T. Gibbons, Inc.,
482 U.S. 437 (1987) 4, 8

Gakm Resources LLC v. Jaylyn Sales Inc.,
No. 08-cv-6030, 2009 WL 2150891
(S.D.N.Y. July 20, 2009) 15

Mayimba Music, Inc. v. Sony/ATV Latin Music Publishing LLC,
No. 12-cv-1094 (S.D.N.Y. Mar. 31, 2016) 18

Mayimba Music, Inc. v. Sony/ATV Latin Music Publishing LLC,
No. 12-cv-1094 (S.D.N.Y. June 9, 2016) 18

Nature's Enters., Inc. v. Pearson,
No. 08-cv-8549, 2010 WL 447377 (S.D.N.Y.
Feb. 9, 2010) 15

Pringle v. Adams,
No. 10-cv-01656, 2014 WL 3706826 (C.D.
Cal. July 23, 2014) 17

Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.,
351 F.3d 1229 (D.C. Cir. 2003) 10

Skidmore v. Led Zeppelin,
No. 15-cv-03462, 2016 WL 6674985 (C.D.
Cal. Aug. 8, 2016) 8

Tempest Publ'g, Inc. v. Hacienda Records & Recording Studio, Inc.,
141 F. Supp. 3d 712 (S.D. Tex. 2015) 19

Twentieth Century Fox Film Corp. v. Entm't Distrib.,
429 F.3d 869 (9th Cir. 2005) 17

U.S. Media Corp. v. Edde Entm't, Inc., No. 94-cv-4849, 1999 WL 498216 (S.D.N.Y. July 14, 1999) 15

Washingtonian Publ'g Co. v. Pearson, 306 U.S. 30 (1939) 3, 7

Williams v. Bridgeport Music, Inc., No. 13-cv-06004, 2016 WL 6822309 (C.D. Cal. Apr. 12, 2016) 8

Statutes

17 U.S.C. § 504 9

17 U.S.C. § 512 11

17 U.S.C. § 505 3

Act of Feb. 26, 1853, ch. 80, 10 Stat. 161 ..... 4, 8

Copyright Act of 1831, ch. 16, § 12, 4 Stat. 436 ..... 4, 8

Copyright Act of 1909, ch. 320, § 40, 35 Stat. 1075 ..... 4, 8

Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 ..... 4, 8

Other Authorities

Am. Intellectual Prop. Law Ass'n, *Report of the Economic Survey 2011* (2012) 7

Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts: 2011 Annual Report of the Director* (2012) 7

Shyamkrishna Balganesh, *Copyright Infringement Markets*, 113 Colum. L. Rev. 2277 (2013) 4, 7

U.S. Copyright Office, *Copyright Small Claims* (Sept. 2013), https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf 3, 9, 10, 19

INTEREST OF *AMICI CURIAE*[1]

Amici curiae the National Music Publishers' Association ("NMPA") and the Recording Industry Association of America ("RIAA") are leading music trade organizations representing the interests of music copyright owners, including music publishers, record companies, and music creators. *Amici*'s members depend upon the rights conferred by the Copyright Act—in particular, the right to enforce their copyrights through litigation—to protect the works they create, invest in, license, and distribute.

NMPA is the principal trade association representing the U.S. music publishing and songwriting industry. Over the last 100 years, NMPA has served as a leading voice representing American music publishers before Congress, in the courts, within the music, entertainment, and technology industries, and to the listening public. NMPA's membership includes major music publishers affiliated with record labels and large entertainment companies as well as independently owned and operated music publishers of all catalog and revenue sizes. Compositions owned or controlled by NMPA's hundreds of members account for the vast majority of musical works licensed for commercial use in the United States.

RIAA is a nonprofit trade organization representing the American recording industry. RIAA supports

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[1] No party or counsel for any party authored any part of this brief or made a monetary contribution intended to fund the preparation or submission of this brief. All parties have provided blanket consent to the filing of *amicus* briefs.

and promotes the creative and financial vitality of the major recorded music companies. Its members are the music labels that comprise the most vibrant record industry in the world. RIAA members create, manufacture, and/or distribute approximately 85 percent of all legitimate recorded music produced and sold in the United States. In support of its members, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels, and monitors and reviews state and federal laws, regulations, and policies.

The question presented in this case bears directly on the ability of *Amici* and their members to protect copyrighted musical works and sound recordings against unauthorized use. The digital distribution of music has changed the industry in myriad ways, including by vastly expanding the incidence and scale of music piracy. A music copyright lawsuit may now involve thousands of copyrighted works and over a million acts of infringement, and give rise to complicated technical questions that require expert resources to address. As a result, in the experience of *Amici* and their members, the cost of enforcing music copyrights through litigation has risen dramatically. The ability to recover not only attorneys' fees but also the actual costs of litigation, as provided under Section 505 of the Copyright Act, is therefore critical to efforts to combat infringement.

Section 505 permits a prevailing copyright litigant to recover the "full costs" of the action, including "a reasonable attorney's fee," in the court's discretion.

17 U.S.C. § 505. Seeking to overcome the plain meaning of this provision, petitioners assert that "full costs" should be read to mean only those costs taxable under the default rule of 28 U.S.C. § 1920. Such a narrow and counterintuitive interpretation of Section 505 would seriously erode the efforts of *Amici* and their members to protect the value of their copyrighted works by seeking legal redress for infringement.

Music copyright owners rely on the ability to seek recovery of the full range of litigation expenses as provided in the Copyright Act, especially in pursuing large-scale or complex infringement actions. If petitioners' constricted interpretation were to prevail, it would eliminate courts' discretion to award meaningful costs to prevailing plaintiffs and undermine the practical ability to take action against music piracy. *Amici* respectfully request that the Court affirm the decision below and confirm that the Copyright Act means what it says and allows trial courts the discretion to award *full* costs, not just those enumerated in 28 U.S.C. § 1920.

SUMMARY OF ARGUMENT

This Court observed nearly 80 years ago that a copyright is of no value to its owner if it cannot be effectively enforced in the courts. *Washingtonian Publ'g Co. v. Pearson*, 306 U.S. 30, 39-40 (1939). However, the cost of pursuing infringement litigation in federal court is significant and at times prohibitive. The Copyright Office has found that "[c]opyright owners whose works are infringed often are deterred from enforcing their rights due to the burden and expense of pursuing litigation in the federal system." U.S.

Copyright Office, *Copyright Small Claims*, at 24 (Sept. 2013), https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf. The cost of copyright litigation has been estimated to be "well over three times the already high average cost of litigation." Shyamkrishna Balganesh, *Copyright Infringement Markets*, 113 Colum. L. Rev. 2277, 2285 (2013).

To mitigate these costs and ensure that copyright owners are properly reimbursed and incentivized to protect their creative works, Congress has repeatedly reaffirmed the longstanding practice of shifting costs in appropriate cases. For almost two centuries, the Copyright Act has permitted courts to award full costs to prevailing parties. *See* Copyright Act of 1831, ch. 16, § 12, 4 Stat. 436, 438-39; Copyright Act of 1909, ch. 320, § 40, 35 Stat. 1075, 1084; Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, 2586. Significantly, the "full costs" provision of the Copyright Act predates the enactment of the Fee Act of 1853, which established the default federal rule for costs and that is today embodied in 28 U.S.C. § 1920; Congress has not seen the need to alter the more specific rule for copyright cases. *See* Act of Feb. 26, 1853 ("Fee Act"), ch. 80, 10 Stat. 161, 161; *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 440 (1987).

The high cost of copyright litigation is a concrete and serious issue for the music industry. Just as the digital era has transformed the distribution of music, it also has transformed music piracy. Litigation costs for copyright actions, in particular those involving online infringement, have increased dramatically. A

single case can involve over a million acts of infringement and implicate complicated technical questions that require costly factual discovery and expert testimony. For example, in *BMG Rights Management (US) LLC v. Cox Communications, Inc.*, a jury found an internet service provider liable for copyright infringement and awarded BMG $25 million in statutory damages. BMG sought to recover its full costs, amounting to nearly $3 million, the bulk of which were expert fees. The district court denied BMG's request for these fees, opining that "nontaxable" costs could not be recovered. Such a result is inconsistent with the clear discretion afforded trial courts under the Copyright Act to award full costs to a prevailing litigant.

In the face of escalating litigation costs, music industry litigants rely on the ability to recover their full costs when appropriate. Without such a recovery, the costs incurred to litigate an infringement case may be grossly disproportionate to a party's recovery of damages. Take, for instance, the case of *Capitol Records, Inc. v. MP3tunes, LLC*, in which music company plaintiffs sued an online music service for online infringement. No. 07-cv-9931, 2015 WL 13684546, at *1 (S.D.N.Y. Apr. 3, 2015). After a lengthy trial, a jury delivered a resounding win to the music companies, awarding tens of millions in damages. *Id.* However, to secure this victory, the prevailing plaintiffs were forced to incur over $12 million in attorneys' fees and litigation expenses. *Id.* at *3. To mitigate their outlay, the music industry plaintiffs sought to recover just over $4 million in attorneys' fees and costs, including approximately $700,000 in "nontaxable" costs

for expert fees and other expenditures. *See Capitol Records, Inc. v. MP3tunes, LLC*, No. 07-cv-9931, 2015 WL 7271565, at *1 (S.D.N.Y. Nov. 12, 2015). The court largely refused to grant the "nontaxable" costs, however.

These cases illustrate why the ability to seek full costs—that is, the true costs of litigation—is necessary to preserve the proper balance of incentives in the copyright system. Without the ability to recover full costs, music industry plaintiffs will be left undercompensated and unable to pursue claims against the most threatening infringers.

The ability to recover costs in defending against baseless claims is also critical. Music publishers and record labels at times are called upon to defend against meritless copyright infringement litigation. The ability to seek full costs not only serves to compensate parties who must respond to such frivolous actions, but also to deter bad-faith actors who face the risk of paying those costs as a losing party.

ARGUMENT

I. The Cost of Enforcing Music Copyrights Through Litigation Can Be Prohibitive.

A. Litigation Costs Are a Barrier to Enforcement of Music Copyrights.

It is critically important for the owners of musical works and sound recordings to be able to enforce their copyrights by taking legal action when they have been

infringed. The value of musical works and sound recordings declines when the cost of copyright enforcement rises. As this Court observed nearly 80 years ago, a copyright is of no value to its owner if it cannot be effectively enforced in the courts. *Washingtonian Publ'g Co. v. Pearson*, 306 U.S. 30, 39-40 (1939).

The costs of pursuing infringement litigation, however, are significant and at times prohibitive. It has been estimated that the average cost to a party of litigating a copyright case through trial ranges from $350,000 to over $1.3 million. Am. Intellectual Prop. Law Ass'n, *Report of the Economic Survey 2011*, at 35 (2012). One scholar recently concluded that the cost of copyright litigation is "well over three times the already high average cost of litigation." Shyamkrishna Balganesh, *Copyright Infringement Markets*, 113 Colum. L. Rev. 2277, 2285 (2013). Moreover, as these costs have increased in recent years, there has been a marked decrease in the number of litigated copyright cases—a 60 percent drop from 2005 to 2011. *Id.* at 2288-89 (citing Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts: 2011 Annual Report of the Director* 130 (2012)).

Especially in a case of online infringement, many of the most significant issues—for example, proof of copying or distribution and the alleged infringer's degree of knowledge—require fact-intensive analysis that, in turn, depends upon extensive discovery and expert testimony. At the same time, an infringement action arising from alleged copying of a single individual work can require sophisticated testimony by

musicologists and market experts.[2]

The long-established practice of cost-shifting in copyright actions advances the goals of the copyright system by ensuring that copyright owners are properly reimbursed and incentivized to protect their creative works. Almost two centuries ago, Congress provided in the 1831 Copyright Act that the prevailing party in a copyright suit may recover the "full costs" of the action. *See* Copyright Act of 1831, ch. 16, § 12, 4 Stat. 436, 438-39. Congress expanded the provision in 1909 to clarify that attorneys' fees are to be included as part of "full costs," Copyright Act of 1909, ch. 320, § 40, 35 Stat. 1075, 1084, and has reaffirmed this rule in subsequent iterations of the Copyright Act, including in the current statute. *See* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, 2586.

Significantly, the "full costs" provision of the Copyright Act predates the enactment of the Fee Act of 1853, which established the default federal rule for costs and whose provisions are today embodied in 28 U.S.C. § 1920. *See* Act of Feb. 26, 1853 ("Fee Act"), ch. 80, 10 Stat. 161, 161; *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 440 (1987). Congress has not

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[2] *See, e.g.*, Memorandum of Points and Authorities in Support of Motion for an Award of Attorneys' Fees and Costs at 21-25, *Williams v. Bridgeport Music, Inc.*, No. 13-cv-06004, 2016 WL 6822309 (C.D. Cal. Apr. 12, 2016), ECF No. 479-1 (discussing role of musicologists and other experts in case involving infringement of popular song); Defendant Warner/Chappell Music, Inc.'s Memorandum of Points and Authorities in Support of Motion for Award of Additional Costs; Declaration at 6, 30-42, *Skidmore v. Led Zeppelin*, No. 15-cv-03462, 2016 WL 6674985 (C.D. Cal. Aug. 8, 2016), ECF No. 295-1 (same).

seen the need to alter the more specific rule for copyright cases.

Permitting courts to award full costs comports with Congress' statutory framework. The amount of statutory damages awarded in a music infringement action is highly discretionary, ranging from a minimum of $200 to a maximum of $150,000 per work infringed. *See* 17 U.S.C. § 504(c). Given the unpredictability of damages awards, the ability to recover full costs mitigates the possibility of a ruling that finds liability but does not award significant damages. If courts are not permitted to award full costs, the plaintiff risks incurring large litigation costs for uncertain damages. Even in cases that are resolved by settlement before trial, the statutory right to seek full costs may yield some amount of compensation for litigation expenses until the time of settlement

High litigation costs for copyright cases are not a theoretical concern; they are a real barrier to the enforcement of music copyrights. The Copyright Office explained in a 2013 report to Congress that "[c]opyright owners whose works are infringed often are deterred from enforcing their rights due to the burden and expense of pursuing litigation in the federal system." U.S. Copyright Office, *Copyright Small Claims*, at 24 (Sept. 2013), https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf; *see also id.* at 13 (stating litigation costs "may well persuade a party to forego bringing a lawsuit or cause a party to settle on less than ideal terms"). This unfortunate reality should not be compounded by negating the statutory right of a copyright owner to be

compensated for the actual costs of litigating after prevailing on an infringement claim.

B. Widespread Online Infringement Has Significantly Exacerbated the Adverse Impact of the High Costs of Copyright Litigation.

The development of the internet has transformed music distribution. It also has transformed music piracy, which can now be carried out with relative ease on a massive scale. As a consequence, the litigation costs associated with addressing music copyright infringement have increased dramatically. Music copyright owners have had to shift resources that would otherwise be invested in the creation of new music toward efforts to stem the tide of digital piracy.

Copyright litigation arising from online infringement of musical works and sound recordings implicates a host of complicated technical issues. Something as mundane as determining the identity of the infringer can require significant litigation resources. For example, a copyright owner may need to file a "John Doe" action in federal court before it can identify internet users associated with infringing activity conducted through an online service provider. *See, e.g.*, *In re Charter Commc'ns, Inc., Subpoena Enf't Matter*, 393 F.3d 771 (8th Cir. 2005) (music industry plaintiffs could not obtain subpoenas to determine identities of alleged online infringers without filing action); *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003) (same); *see also* U.S. Copyright Office, *supra*, at 18–19

(discussing the difficulty in identifying online infringers).

In addition, the scale of piracy litigation has grown enormously, as noted above. A recent lawsuit involving infringement of sound recordings on a single online service provider's network included allegations of more than one million acts of infringement. *See* Plaintiffs' Original Complaint at 2, ECF No. 1, *UMG Recordings, Inc. v. Grande Commc'ns Networks LLC*, No. 17-cv-365, (W.D. Tex. filed Apr. 21, 2017).

One of the largest drivers of costs in modern music copyright litigation is expert fees. As copyright litigation involving online infringement of musical works and sound recordings has become increasingly complex, it has necessitated the use of experts to document and analyze the data necessary to demonstrate infringement or the failure to comply with other requirements applicable to online providers under the Copyright Act.[3] These experts generate substantial litigation costs that music industry litigants cannot help but incur if they wish to protect the value of their copyrighted works.

The recent case of *BMG Rights Management (US) LLC v. Cox Communications, Inc.* well illustrates the

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[3] For instance, Section 512 of the Copyright Act, enacted in 1998 as part of the Digital Millennium Copyright Act, provides a safe harbor from infringement liability for online service providers if they comply with certain requirements set forth in the statute, including removal of infringing material upon receipt of a copyright owner's notice and adoption of a policy to track and terminate repeat infringers. *See generally* 17 U.S.C. § 512.

costs involved in litigating a modern music infringement case. As is increasingly true of copyright litigation, this action involved well over a thousand copyrights, hundreds of thousands of infringers, and millions of infringing acts. *See BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 149 F. Supp. 3d 634, 638, 640 (E.D. Va. 2015), *aff'd in part, rev'd in part on other grounds*, 881 F.3d 293 (4th Cir. 2018). In order to pursue its claims, BMG needed to conduct extensive document and electronic discovery. Litigating the case required the time-consuming task of piecing together incomplete, scattered records to demonstrate that Cox repeatedly allowed egregious copyright infringers to remain online. Brief in Support of BMG's Motion for Attorneys' Fees and Costs at 7, ECF No. 828, *BMG*, 234 F. Supp. 3d 760 (No. 14-cv-1611); *see also BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 234 F. Supp. 3d 760, 767 (E.D. Va. 2017), *vacated on other grounds*, 881 F.3d 293 (4th Cir. 2018). Moreover, BMG had to take or defend 36 depositions of 28 witnesses, including 11 expert witnesses, which amounted to approximately 270 hours of deposition testimony. Brief in Support of BMG's Motion for Attorneys' Fees and Costs at 27. BMG also had to engage a team of experts to analyze and present evidence to the jury. One expert was required to provide testimony on the high-tech software used by plaintiffs' agent to search websites to identify files that appeared to contain plaintiffs' musical works. Declaration of Michael J. Allan in Support of Plaintiff BMG's Petition for Attorneys' Fees and Expenses at 31, ECF No. 829, *BMG*, 234 F. Supp. 3d 760 (No. 14-cv-1611). Another expert was required to confirm that instances of infringement at particular IP addresses

related to the same Cox subscribers. *Id.* Still other experts were needed to testify on the workings of Cox's automated system for processing (and rejecting) infringement notices, as well as Cox's profits from the infringement on its network. *Id.* at 30. Finally, another expert conducted a survey that established that a substantial portion of Cox's customers valued the ability to use Cox's network to infringe. *Id.* at 31.

Following trial, a jury found Cox liable for copyright infringement and awarded BMG $25 million in statutory damages. BMG sought to recover its full costs, which amounted to $2.92 million, the vast majority of which—over $2.44 million—were for expert fees. *Id.* at 29, 31. Noting the circuit split on this issue, however, the district court denied BMG's motion for costs, opining that such costs could not be awarded.[4] *BMG*, 234 F. Supp. 3d at 778-80. Such an outcome is inconsistent with both the letter and spirit of the Copyright Act, which clearly allows trial courts the discretion to reimburse the prevailing party for expert fees and other "nontaxable" costs.

II. The Ability to Recover Full Costs Is Necessary to Mitigate the Expense of Protecting Music Copyrights.

The kinds of litigation costs discussed above have

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[4] The district court awarded $8,383,468 in attorneys' fees and $146,791 in taxable costs, finding that Cox's defense in the case "lacked a basis in fact and was therefore objectively unreasonable." *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 234 F. Supp. 3d 760, 785 (E.D. Va. 2017), *aff'd in part, rev'd in part on other grounds*, 881 F.3d 293 (4th Cir. 2018).

become increasingly common for music copyright owners seeking to protect their works against infringement. Understandably, then, music industry plaintiffs seek to recover their full costs in appropriate cases. Without such a recovery, the costs incurred to litigate an infringement case may be grossly disproportionate to a prevailing party's recovery of damages. Indeed, a prevailing party's costs may actually exceed the amount of its recovery.

A. Awarding Full Costs Provides the Proper Incentive Needed for Plaintiffs to Tackle Large-Scale Infringement.

Without recovery of full costs, music publishers and record companies can face disincentives when considering the prospect of expensive litigation to shut down an infringer. Take, for instance, the case of *Capitol Records, Inc. v. MP3tunes, LLC*, in which music company plaintiffs sued an online music service for massive online infringement. No. 07-cv-9931, 2015 WL 13684546, at *1 (S.D.N.Y. Apr. 3, 2015). After a lengthy trial, a jury delivered a resounding win to the music companies, awarding some $48 million in damages, which the court reduced to $23 million. *Id.* at *1. In order to secure this judgment, plaintiffs incurred "in excess of $12 million in attorneys' fees and costs." *Id.* at *3.

The music industry plaintiffs sought to recover a little over $4 million in attorneys' fees and costs, which included approximately $700,000 in "nontaxable" costs. *See Capitol Records, Inc. v. MP3tunes, LLC*, No. 07-9931, 2015 WL 7271565, at *1 (S.D.N.Y.

Nov. 12, 2015). These "nontaxable" costs related to electronic discovery, trial support, travel, electronic research, rebuttal expert fees, and consulting fees. *Id.* at *6. The court awarded only a fraction of these "nontaxable" costs, denying reimbursement for the rebuttal experts and other professional services. *Id.* In so doing, the court observed that other courts in the district had held that the only costs recoverable were those enumerated in 17 U.S.C. § 1920. *Id.* (citing *Nature's Enters., Inc. v. Pearson*, No. 08-cv-8549, 2010 WL 447377, at *10 (S.D.N.Y. Feb. 9, 2010) and *U.S. Media Corp. v. Edde Entm't, Inc.*, No. 94-cv-4849, 1999 WL 498216, at *7 (S.D.N.Y. July 14, 1999)). Perhaps concerned with an overly harsh result, however, despite denying professional fees, the court did allow "'reasonable out-of-pocket' expenses incurred during litigation as part of their attorneys' fee award." *Id.* (quoting *Berry v. Deutsche Bank Trust Co. Americas*, 632 F. Supp. 2d 300, 306 (S.D.N.Y. 2009)).[5]

Given the ongoing threat of online music piracy, there is a continuing need for music copyright owners

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[5] The court awarded costs for the "types of routine costs awarded to previous parties in trademark and copyright infringement actions." *Id.* (quoting *Gakm Resources LLC v. Jaylyn Sales Inc.*, No. 08-cv-6030, 2009 WL 2150891, at *10 (S.D.N.Y. July 20, 2009) (internal quotation marks omitted)). The allowed costs, totaling roughly $250,000, were to reimburse for electronic discovery, photocopying and printing, legal database research, and travel. *Id.* After the court made this award, the parties entered into a global settlement of all issues, including costs and fees. *See* Stipulation and Order Adjourning Action and Approving Conditional Final Consent Judgment, ECF No. 760, *Capitol Records, Inc. v. MP3tunes, LLC*, No. 07-cv-9931 (S.D.N.Y. Jan. 26, 2018).

to take legal action to protect the value of their musical works and sound recordings and the livelihoods of those who create them.[6] The practical ability to pursue challenging litigation is essential not only to stop piracy and compensate copyright owners and creators for unauthorized uses, but to protect and foster the legitimate online marketplace. Given the need to gather and analyze vast amounts of data in complex copyright cases, the ability to seek full costs—that is, the true costs of litigation—is necessary to preserve the proper balance of incentives in the copyright system. Otherwise, music industry plaintiffs will be left undercompensated and hamstrung in their ability to pursue claims against the most threatening infringers.

B. Defendants and Claimants in Smaller Copyright Cases Also Rely on the Ability to Recover Full Costs.

1. Defendants Need Full Cost Recovery as a Deterrent to Meritless Litigation

Music publishers and record labels are also at times called upon to defend against meritless copyright infringement litigation. The ability to recover

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[6] Examples of such ongoing litigation efforts include *UMG Recordings, Inc. v. Grande Communications*, No. 17-cv-365 (W.D. Tex. filed Apr. 21, 2017), *Sony Music Entertainment v. Cox Communications, Inc.*, No. 18-00950 (E.D. Va. filed July 31, 2018), *Atlantic Recording Corporation v. Spinrilla, LLC*, No. 17-cv-431 (N.D. Ga. filed Feb. 3, 2017), and *UMG Recordings, Inc. v. Kurbanov*, No. 18-cv-957 (E.D. Va. filed Aug. 3, 2018).

costs in defending against baseless claims not only serves to compensate responding parties for frivolous actions, but also to deter bad-faith actors who must face the risk of having to pay those costs as a losing party.

Pringle v. Adams illustrates why the Ninth Circuit's statutory interpretation correctly allows awarding of full costs. No. 10-cv-01656, 2014 WL 3706826 (C.D. Cal. July 23, 2014). In *Pringle*, several music industry defendants were sued for supposed infringement of a song. *Id.* at *1. After winning on summary judgment, the defendants sought full costs, including approximately $300,000 of "nontaxable" costs for expert witness fees, online legal research charges, deposition costs, and court expenses. *Id.* at *7; Defendants' Supplemental Brief in Further Support of Motion for an Award of Attorneys' Fees and Full Costs at 15, ECF No. 304, *Pringle*, 2014 WL 3706826 (No. 8:10-cv-1656). In its order granting attorneys' fees and costs, the court referenced that the Ninth Circuit had affirmed summary judgment on appeal in part because plaintiff's evidence "raise[d] only the barest possibility" that defendants had access to plaintiff's song. *Pringle*, 2014 WL 3706826, at *2. Relying on Ninth Circuit precedent, the court compensated the prevailing defendants for the unwarranted cost of defending against meritless claims. *Pringle*, 2014 WL 3706826, at *7-8 (citing *Twentieth Century Fox Film Corp. v. Entm't Distrib.*, 429 F.3d 869, 885 (9th Cir. 2005)).

Similarly, a New York court awarded costs to the defendants in *Mayimba Music, Inc. v. Sony/ATV*

Latin Music Publishing LLC, which involved the rightful ownership of a song popularized by Shakira. Order Denying Plaintiff's Motion to Vacate Judgment, and Granting Defendants' Motion for Sanctions at 1, ECF No. 256, *Mayimba Music, Inc. v. Sony/ATV Latin Music Publishing LLC*, No. 12-cv-1094 (S.D.N.Y. Mar. 31, 2016). After concluding that the plaintiff lacked a valid copyright because it had fabricated the date on which it had authored its work, the court, exercising its discretion in light of defendant's bad faith, awarded $50,000 of "nontaxable" costs in addition to attorneys' fees accrued from the date of a crucial motion in the case. *Id.* at 1-3; Order Approving Application for Attorney's Fees at 1-2, ECF No. 268, *Mayimba Music, Inc. v. Sony/ATV Latin Music Publishing LLC*, No. 12-cv-1094 (S.D.N.Y. June 9, 2016).

The cost awards in such cases help to ensure that defendants are not cowed into settling meritless claims simply because of the expense required to vindicate their copyrights. At the same time, they reduce the incentives for disingenuous actors to bring frivolous litigation.

2. Absent the Ability to Recover Full Costs, Music Litigants May Lose More Than They Win.

A rule precluding courts from awarding full costs would also be detrimental to copyright owners seeking to bring modest-sized infringement claims, particularly in light of the lower damages awarded in such cases.

Claimants with smaller infringement claims face

formidable challenges in enforcing their copyrights. U.S. Copyright Office, *supra*, at 3. "Especially in the case of lower-value copyright claims, the potential for monetary recovery can be quickly overcome by the costs of discovery, motion practice, and other litigation expenses." *Id.* at 24. Indeed, litigation costs are generally disproportionately large in cases with modest-sized claims. *Id.* at 24-25. These problems are compounded when courts do not fully compensate prevailing parties for their costs in bringing the case. By excluding costs related to discovery or experts, courts deter copyright owners from asserting meritorious claims, as the costs of litigating can outweigh the recovery.

In *Tempest Publishing, Inc. v. Hacienda Records & Recording Studio, Inc.*, for example, the court awarded $5,000 in damages for infringement of the plaintiff's song. 141 F. Supp. 3d 712, 717 (S.D. Tex. 2015). The prevailing party's litigation costs were more than three times that amount, however, and the court denied recovery of the plaintiff's "nontaxable" costs, which amounted to over $4,000. *Id.* at 724-26; Plaintiff's Bill of Costs at 2-3, ECF No. 131, *Tempest*, 141 F. Supp. 3d 712 (No. 4:12-cv-736). In the end, the prevailing party achieved a largely Pyrrhic victory. The inability to recover full costs in such a case, notwithstanding the express language of the Copyright Act, renders enforcement of one's copyright a losing proposition.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's judgment should be affirmed.

Respectfully submitted.

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